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IN THE

Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

JAMES N. KIRBY PTY LIMITED d/b/a KIRBY ENGINEERING and ALLIANZ AUSTRALIA LIMITED,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF JAN RAMBERG AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

This brief discusses the first question presented:

Whether a cargo owner that contracts with a freight-forwarder for transportation of goods to a destination in the United States is bound by the contracts that the freight forwarder makes with carriers to provide that transportation.

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INTEREST OF *AMICUS CURIAE*

Jan Ramberg respectfully submits this brief as *amicus curiae*, pursuant to Rule 37 of the Rules of this Court.[1]

Jan Ramberg is professor emeritus of the Law Faculty of the University of Stockholm where, before his retirement, he held the position of Dean. He also is an honorary professor of Riga Graduate School of Law where, after having established the law school according to a treaty between the Swedish and Latvian governments, he served as Rector from 1998 to 2001. He is an honorary vice president of the Comité Maritime International ("CMI") and an honorary member of the International Federation of Freight Forwarders Associations ("FIATA"). Currently, he serves as the vice president of the Commission on Law and Practice of the International Chamber of Commerce ("ICC"). Previously, he chaired the Working Group established by the United Nations Conference on Trade and Development ("UNCTAD") and by the ICC in order to prepare the 1992 UNCTAD/ICC Rules for Multimodal Transport Documents (ICC pub. 481)—which is the only international regime applicable to multimodal transport and which formed the basis of the 1992 version of the Negotiable FIATA Multimodal Transport Bill of Lading ("FBL")—the bill of lading used in the present case.

Professor Ramberg is the author of several books within the field of transportation law, including INTERNATIONAL COMMERCIAL TRANSACTIONS (2000), GUIDE TO INCOTERMS 2000 (2000) (ICC pub. 620), and THE LAW OF FREIGHT FORWARDING (2002), which is an updated version of his original THE LAW OF FREIGHT FORWARDING AND THE 1992 FIATA MULTIMODAL TRANSPORT BILL OF LADING (1993), which was cited by the court of appeals below. Professor Ramberg also is the author of numerous articles in law journals worldwide. His contributions appear in his native Swedish, and also in English, French, Arabic, Chinese, Russian, and Spanish, among other languages.

For the present case, it is particularly important to note that Professor Ramberg served as the chairman of FIATA's Combined Transport Committee. In that capacity he drafted, in 1971, the first version of the FIATA Combined Transport Bill of Lading, as the FBL was then called. The 1971 FBL was revised in 1992 and is known as the Negotiable FIATA Multimodal Transport Bill of Lading. It is the 1992 version of the FBL that was used in this case. FIATA published Professor Ramberg's THE LAW OF FREIGHT FORWARDING AND THE 1992 FIATA MULTIMODAL TRANSPORT BILL OF LADING (1993) and his THE LAW OF FREIGHT FORWARDING (2002) as authoritative explanations of the 1992 FBL. The earlier work has been cited as authority on the construction of the FBL in this case by the court below,[2] the petitioner,[3] the respondents,[4] and the Government.[5]

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1. No counsel for a party authored this brief in whole or in part. No person or entity other than the *amicus curiae* or his counsel made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of the parties, reflected in letters on file with the Clerk.

2. *See* Pet. App. 8a-9a, 17a.

3. *See* Petition at 6, 8, 28; Brief of Petitioner at 13, 14, 44, 47.

4. *See* Respondents' brief and reply brief in the court of appeals.

5. *See* Brief of Solicitor General as *Amicus Curiae* at 17, 28.

Professor Ramberg has spent a professional lifetime working to establish the international use of the FBL and the UNCTAD/ICC Rules, with the view of ensuring that the FBL functions as a standard form document and is interpreted in the same way wherever it is used. He therefore would deplore any decision by a court of repute, and in particular by the Supreme Court of the United States, holding that the FBL fails in its purpose of providing a uniform means of establishing the issuer as a *carrier* instead of an *agent* of the shipper. Because such a holding could result in discrepant interpretations of the FBL in the country of origin and the country of destination, as Norfolk Southern urges here, the petitioner's position would represent a backward step and result in considerable confusion in international commerce, both in claims settlements and in financing goods under documentary credits.

SUMMARY OF ARGUMENT

The FBL form bill of lading used in this transaction was designed to create a shipper-carrier relationship, not an agency relationship. This conclusion is demonstrated by the terms of the FBL, explained by the history of the form, and justified by the choice given to the parties to structure their transaction in the manner that will best serve their commercial needs. If the parties wish to create an agency relationship, FIATA publishes other standard forms that would accommodate this need.

I. The term "Freight Forwarder" has different meanings depending on the intent of the parties as reflected in their decision to use either the FIATA FBL or FCT. When the parties decide the freight forwarder will use the latter, it acts as the shipper's agent. The choice to use the FBL on the other

hand demonstrates the freight forwarder's intent to act as a carrier and to undertake the corresponding carrier rights and responsibilities. FIATA does not use different terminology to distinguish between a traditional freight forwarder and the N.V.O.C.C. as described in U.S. law. However, international law recognizes the distinction in contrasting functions and liabilities of agents and carriers as is reflected in the FCT as compared to the FBL.

II. Prior to FIATA, there was confusion in some cases among various countries' national laws concerning the status and liability of a freight forwarder as either agent or principal. In order to avoid accepting carrier liability where freight forwarders did not expressly agree to do so, attempts were made to develop an international regime to address legal inconsistencies in dealing with the status of the freight forwarder. This culminated in the members of FIATA drafting the freight forwarder's bill of lading form; laying the groundwork for negotiability of freight forwarder bills of lading.

III. The FBL clarified the freight forwarder's liability when it acts as carrier. As a result, international banks and insurance carriers regard the FBL in the same manner as any other negotiable bill of lading issued by a vessel owner or operator. By affording the parties the choice of whether the freight forwarder will act as agent or carrier, the FBL promotes international uniformity and facilitates commercial transactions using these documents.

IV. The FBL resolves the issue of determining which liability regime will apply to multi-modal transport by adopting the "network principle" which permits the parties to establish which international convention or national law will apply depending upon where the loss occurs during the transportation.

ARGUMENT

I. "Freight Forwarder": A Carrier under an FBL; an Agent under an FCT

It is important to identify precisely what is at issue in this case. The petitioner asks this Court, in effect, to reform a contract to which the petitioner was not a party. The petitioner asks this Court to declare that the parties to the contract do not stand in relation as shipper and carrier, but rather as principal and agent.

This brief argues that the FBL form bill of lading used by the parties is designed to create a shipper-carrier relationship, not an agency relationship, and that establishment of a carrier relationship does not confer authority on the carrier to bind the shipper to any subsequent contracts entered into between the forwarder as carrier and any other party.[6] This form bill, promulgated by the International Federation of Freight Forwarders Associations ("FIATA"), is intended to allow freight forwarders who issue it to create a carrier relationship with their shippers. Although the FBL form (original, 1971; revised, 1992) has been used

6. This brief addresses only the *agency* issue expressed in question 1. Professor Ramberg agrees with the court of appeals' determination that the Himalaya Clause in the FBL was intended to protect only those parties that had contracted with the Freight Forwarder that issued the FBL, and therefore the court of appeals was correct to reject Norfolk Southern's argument that it was a protected party within the terms of the FBL. That question, however, is simply a matter of drafting; different bills of lading will contain different Himalaya Clauses. Because question 2 does not go to the very core of the FBL's essential purpose of designating the issuing freight forwarder as a carrier, not an agent, in relation to the shipper, Professor Ramberg limits his argument in this brief to question 1.

worldwide with great success for more than three decades, it does not suit the petitioner that the FBL should be interpreted by the U.S. courts as written or as intended. Instead, petitioner urges this Court to interpret the FBL as embodying an agency agreement between the shipper and the issuing freight forwarder, and as rendering the shipper on the FBL bound to other carriers, particularly the ocean carrier with whom the freight forwarder subcontracted for the ocean transportation and perhaps even the rail carrier with whom the ocean carrier's agent subcontracted for inland transportation.

In this case, an Australian shipper contracted with an Australian freight forwarder to deliver ten container loads of goods from Sydney to Huntsville, Alabama. Their contract was memorialized on a FIATA form FBL. Under the FBL, the Australian freight forwarder assumed carrier responsibility for the goods from Sydney to Huntsville. The FBL fixed the relationship of the parties as one between shipper and carrier. The parties did not intend, and the FBL does not reflect, that the freight forwarder would act as the shipper's agent in booking transportation from Sydney to Huntsville. Citation of a few clauses of the FBL will demonstrate that the parties to the FBL have created a shipper-*carrier* (as opposed to an *agency*) relationship.

The Definitions section of the FBL defines "Freight Forwarder" as "the Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the multimodal transport contract as a *carrier*." *See* Standard Conditions (1992) governing the FIATA MULTIMODAL TRANSPORT BILL OF LADING, first paragraph (unnumbered).

Clause 2, entitled "Issuance of this FBL," provides the following:

> 2.1 By issuance of this FBL, the Freight Forwarder
>
> (a) undertakes to perform and/or in his own name to procure the performance of the entire transport, from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL;
>
> (b) assumes liability as set out in these conditions.
>
> 2.2 Subject to the Conditions of this FBL the Freight Forwarder shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or any other person of whose services he makes use for the performance of the contract evidenced by this FBL, as if such acts and omissions were his own.

Standard Conditions (1992) governing the FIATA MULTIMODAL TRANSPORT BILL OF LADING, cl. 2.1, 2.2. Nothing in the FBL confers any authority on the forwarder to act on the shipper's behalf, to bind the shipper to any subsequent contracts entered into by the forwarder, or to agree to subsequent terms of carriage that might be inimical to the shipper's interests.

In addition to the FBL, FIATA also provides its members with the option of issuing a Forwarders Certificate of Transport ("FCT") for use when the shipper and freight forwarder truly intend their relationship to be an *agency* one. In such event, the freight forwarder will not issue an FBL but, instead, an FCT. Unlike the FBL, which names the consignor in the upper left corner, the FCT names "Suppliers or Forwarders Principals."[7]

Furthermore, the FCT lists six conditions, of which Clause 2 provides: "The undersigned do not act as Carriers but as Forwarders. In consequence they are only responsible for the careful selection of third parties, instructed by them, subject to the conditions of Clause 3 hereunder." Forwarders Certificate of Transport, cl. 2.

Clause 3 provides that the forwarder is responsible to deliver the goods to the holder of the FCT, but is not responsible for the acts or omissions of carriers involved in the execution of the transport or of other third parties. *See id.* cl. 3.

The signature block expressly refers to the forwarder's customers as "our Principals":

> We, the Undersigned Forwarders in accordance with the instructions of our Principals, have taken charge of the above-mentioned goods at: ..... for despatch and delivery as stated above or order against surrender of this document properly endorsed.

Id., signature block.

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7. For the convenience of the Court, a specimen copy of the FCT is attached to this brief as Addendum 1.

Under the framework developed by FIATA, the FCT does not subject the freight forwarder to carrier liability, as does the FBL. The FCT only obligates the freight forwarder to act as the shipper's agent to forward the goods (*i.e.*, to make arrangements with one or more carriers to perform the transport), and the forwarder's liability is restricted to failure to deliver the goods to the consignee or holder of the FCT and to negligent selection of carriers and other third parties to perform all or portions of the transport. The difference in contractual relationship established by the forwarder when using the FCT versus the FBL is also reflected in substantially different commercial terms and scope of duties and liabilities. It therefore would be inconsistent with the intent behind the FBL to hold that the forwarder is in all circumstances able to bind the shipper to sub-contracts of carriage that the forwarder enters into to carry the goods to their ultimate destination.

As the discussion above of the FBL and FCT reveals, the term "Freight Forwarder" has two different meanings in FIATA documentation. When the freight forwarder issues an FCT for the goods, it functions as a traditional freight forwarder that acts as the shipper's agent to make transportation arrangements between the shipper and the carrier. On the other hand, when the freight forwarder issues an FBL for the goods, it functions as a carrier that—far from being the agent of the shipper—is an independent contractor that contracts on its own behalf with the shipper and assumes carrier responsibility for the goods from origin to destination.

In developing such documents as the FBL and FCT, FIATA decided to retain the traditional term "Freight Forwarder," and to create new documents that would memorialize whether the freight forwarder, in respect of a

given transport, was acting as the agent of the shipper or as an independent carrier. The U.S. Federal Maritime Commission, however, chose a different path. Faced with the task of regulating freight forwarders who, in growing numbers, were issuing their own bills of lading in which they assumed carrier responsibility, the Federal Maritime Commission adopted the term "Non-Vessel-Operating Common Carrier" to denote carriers that, like FIATA freight forwarders, did not own or operate the carrying vessels, but that nevertheless assumed carrier responsibility.

The Commission created this terminology by regulation. In 1984, the U.S. Congress enacted new shipping legislation—the Shipping Act of 1984—that included the term "Non-Vessel-Operating Common Carrier" in the act itself. In 1998, Congress amended the Shipping Act of 1984 through the Ocean Shipping Reform Act of 1998. In that amendment, Congress created a single class to embrace both freight forwarders and non-vessel-operating common carriers; they were brought together under the rubric "Ocean Transportation Intermediaries."[8]

As defined in the Shipping Act, 46 U.S.C. app. § 1702(17), the United States recognizes two versions of ocean transportation intermediary—the ocean freight forwarder (*see* 46 U.S.C. app. § 1702(17)(A)) and the non-vessel-operating common carrier ((*see* 46 U.S.C. app. § 1702(17)(B)).

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8. A carrier's bill of lading issued by an ocean intermediary will have precisely the same effects and legal consequences as a bill of lading issued by a vessel-operating common carrier ("VOCC"). Indeed, in many vessel sharing arrangements, there will be no difference between a VOCC and an intermediary. Both contractually arrange for carriage to be conducted by a third party, yet both issue their own bill of lading and both contractually accept a carrier's liability.

As FIATA did not develop a different term for the freight forwarder that assumes carrier liability, in explaining the meaning of the FIATA FBL Professor Ramberg, like his prior publications on the FBL, will use the FIATA term "Freight Forwarder," and not the U.S. statutory term "Non-Vessel-Operating Common Carrier" when discussing freight forwarders that, like non-vessel-operating common carriers, are carriers when they contract transport with shippers, and thus act as principals on their own behalf rather than as agents of the shipper.

Traditionally, the term for "Freight Forwarder" in other countries has connoted the freight forwarder that acts as agent for the shipper and assumes no carrier responsibility. This probably is attributable to the term being settled upon long before the advent of containerized shipping, which eventually led to the emergence of a new niche service wherein some freight forwarders expanded their revenues by providing more complete carrier services, including the issuance of bills of lading in which they assumed carrier responsibility for shipments that they formerly merely booked in their capacity as agents of the shipper.

The role of forwarder as the shipper's booking agent appears to be reflected in the Italian word for freight forwarder—*spedizionere*—derived from the verb *spedire*, meaning to dispatch; to ship; to forward. The corresponding terms for freight forwarder in German and in Swedish are *Spediteur* and *speditör*. The French distinguish between the *transitaire* and *commissionaire de transport*. The *transitaire* is a forwarding agent, like the German *Spediteur*, and is liable only if it fails to exercise due diligence in the choice of the

carrier with whom it books the transport.[9] On the other hand, the *commissionaire de transport* has carrier responsibility, like the non-vessel-operating common carrier under U.S. law and the FIATA freight forwarder that issues an FBL and thereby assumes carrier responsibility.

In these ways, therefore, international practice has approximated the dual character of forwarders recognized by FIATA, although certain distinctions emerge in different countries. For that reason, it would be incorrect to view all forwarders the same way—their role, liabilities, and capacity to bind the shipper to their own contracts depends greatly on the contractual circumstances of their relationship to the shipper. It seems unlikely that, given those contractual differences, a unified international law for freight forwarders will emerge: the notion of "commission agent" is unknown in English law and the United States follows its own practice of designating by statute those freight forwarders that assume carrier liability as "non-vessel-operating common carriers," that are required to file carrier tariffs, maintain security against transportation-related claims, and follow most of the same requirements imposed on actual carriers.[10]

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9. French freight forwarders (*transitaires*) are regulated in the Code de Commerce, arts. 95-102.

10. *See* JAN RAMBERG, INTERNATIONAL COMMERCIAL TRANSACTIONS 169, 187 (2d ed. 2000) for a fuller discussion of the various terms used for international freight forwarders.

II. Creation of the FBL Recognized Changes in the Role of "Freight Forwarders"

Traditionally, the freight forwarder did not assume liability as a carrier. It merely acted for the purpose of connecting the shipper with the carrier, either as an agent for the shipper or as an agent for the carrier. The forwarder's traditional function as an agent has been well described in an English case, in which Justice Rowlatt explained:

> [A] forwarding agent is not a carrier; he does not obtain the possession of the goods; he does not undertake the delivery of them at the other end .... All that he does is to act as agent for the owner of the goods, to make arrangements with the people who do carry ....

Jones v. European & General Express Co., 90 L.J.K.B. 159, 160 (K.B. 1920); *see also* JAN RAMBERG, THE LAW OF FREIGHT FORWARDING 13 (2002).

The problem of distinguishing between an agent and a principal—well known in commercial law—became the principal means of determining whether a forwarder was acting as the shipper's agent or as a carrier in its own right. Although the distinction is comparatively straightforward in Anglo-American law, further complications often arise in continental European and in Scandinavian law, which recognize an "intermediate stage" between agent and principal—the so-called "commission agent," which acts in its own name but for the account of the principal. In that situation, the commission agent, by acting in its own name, would become a party to the contract, but as it acted on behalf of its principal it would owe the principal an accounting for the contract it had entered into for the benefit of the principal.

Through those means, the important distinction developed whereby the commission agent became the "formal" contracting party, while the principal, without being the "formal" contracting party became the party directly interested in the contract. Moreover, the commission agent was unable to avoid the position of "formal" contracting party by disclosing its principal, and thus a substantial difference arose between a "commission agent" under continental European and Scandinavian law and an agent of an undisclosed principal in Anglo-American law. *See* Jan Ramberg, *Freight Forwarders*, in MULTIMODAL TRANSPORT: AVOIDING LEGAL PROBLEMS 23 (Diana Faber ed. 1997); RAMBERG, LAW OF FREIGHT FORWARDING, *supra*, at 18-19.

Some of those difficulties, as well as a changing commercial environment, led freight forwarders to voluntarily accept liability as contracting carriers, usually according to general conditions elaborated by national freight forwarding associations. Historically, however, it has sometimes been difficult to resolve when the freight forwarder acted as a carrier rather than as an agent without carrier liability. The variations in practice are sufficiently large that it is difficult to reach international agreement beyond the principle that the freight forwarder that expressly accepts such liability (or that may in appropriate circumstance be implied to have assumed it) is liable as a contracting carrier. Ordinarily, when a forwarder holds itself out as a carrier in the presentation of his traffic, particularly when acting as a cargo consolidator, that would normally be sufficient as an implied agreement to make the forwarder liable as a carrier, even in the absence of an express agreement. If the forwarder issues a bill of lading assuming

carrier liability,[11] a CMR waybill[12] in his own name, or a similar transport document, this would be equivalent to an express acceptance of carrier liability. *See* RAMBERG, INTERNATIONAL COMMERCIAL TRANSACTIONS at 188 (2d ed. 2000).

The law and practice of freight forwarding developed quite differently in different countries, and was never subjected to any unifying international regime. Thus, some decades ago one had to cope with considerable difficulties and inconsistencies in deciding on the legal status of the freight forwarder (as agent or as principal). UNIDROIT—The International Institute for the Unification of Private Law[13]—prepared a Draft convention on the Contract of Agency for Forwarding Agents Relating to International Carriage of Goods, but the draft convention was not submitted to diplomatic conference. It is interesting to note, however, that UNIDROIT proposed to subject freight forwarders to carrier liability if they acted as a cargo

11. After 1971, of course, the FBL was such a bill of lading.

12. CMR refers the Convention on the Contract for International Carriage by Road, found in the United Nations Treaty Series at 399 U.N.T.S. 189.

13. As self-described in its web page, "[t]he International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organisation with its seat in the Villa Aldobrandini in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States." It further explains that it was "[s]et up in 1926 as an auxiliary organ of the League of Nations, the Institute was following the demise of the League, re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute."

consolidator, quoted a fixed price, or issued a "Titre de Commission." *See* RAMBERG, INTERNATIONAL COMMERCIAL TRANSACTIONS at 188.

Nevertheless, the tension between the irreconcilable national versions of freight forwarding law and the growing need and demand for a uniform freight forwarding law prompted the members of FIATA to put together a draft of a freight forwarder's bill of lading which would allow the issuing forwarder to indicate on the bill whether it was acting in the traditional capacity of a freight forwarder (an agent of the shipper) or as a forwarder assuming carrier liability (a non-vessel-operating common carrier).

This innovation in forwarders' bills of lading was driven by the fact that, for many years, freight forwarders had been assembling parcels from different shippers into ocean containers, railway wagons, or trucks for delivery to different consignees. As this so-called cargo consolidation service naturally expanded to the transport of goods in ocean containers, a number of the freight forwarders denounced their carrier status, although the German Code of Commerce held freight forwarders accountable as carriers, *see Handelgesetzbuch* § 413 (after the 1998 amendments, § 459), as did the French Code of Commerce, *see Code de Commerce* arts. 94-102. As a result, the previous versions of the Uniform Customs and Practice ("UCP") stipulated that bills of lading issued by freight forwarding agents should be refused. Before 1983, the rules sponsored by the ICC for documentary credits—the UCP—required bankers to reject bills of lading issued by freight forwarders. At first sight, this may seem peculiar and, indeed, discriminatory against freight forwarders. The origin is simply the traditional practice whereby freight forwarders denounced local carrier liability

in their own house bills of lading. Such local carrier liability would include from the time the forwarder accepted the goods until the time it delivered the goods to the first subcontracted carrier. When a forwarder assumes a carrier's liability, there is no sound reason not to accept a negotiable bill of lading for documentary credits.

III. The FBL Eliminated the Fundamental Difference Between "Freight Forwarders" issuing That Bill and Traditional Carriers

With the considerable increase of the container trade in the late 1960s and the ensuing development of multimodal carriage, FIATA drafted and presented in 1971 what was then called the FIATA Combined Transport Bill of Lading. This was replaced in 1992 by a version of that document now called the Negotiable FIATA Multimodal Transport Bill of Lading—i.e., the FBL. In the FBL, the freight forwarder clearly assumes liability as a carrier and liability as a multimodal transport operator subject to the 1991 UNCTAD/ICC Rules for Multimodal Transport Documents. *See* RAMBERG, INTERNATIONAL COMMERCIAL TRANSACTIONS at 486.

Now that the FBL has achieved a promise by the freight forwarders to fulfill their carrier liability functions at the local level, there is no longer a fundamental difference between the FBL and bills of lading issued by or on behalf of ship owners, shipping lines, charterers, ship operators, and container consortia. Nevertheless, the old practice created considerable confusion and difficulty, especially for banks trying to make the distinction between a freight forwarder acting as agent and a freight forwarder acting as carrier and principal in connection with the carriage of goods by sea.

The emergence of the FBL, however, forced an end to the discriminatory policy against forwarders. The 1983 version of the UCP provided that a FIATA FBL would be recognized as a carrier bill of lading when issued by a freight forwarder in connection with documentary credits. *See* JAN RAMBERG, THE LAW OF FREIGHT FORWARDING 89 (2002).

The drafters of the 1983 UCP created a specific reference to the FBL in article 25 of the UCP. From a strictly legal standpoint, article 25 was superfluous, as indicated by the more recent view of FIATA that a reference to the FBL no longer is necessary to qualify the transport document as one establishing carrier liability. *See* JAN RAMBERG, THE LAW OF FREIGHT FORWARDING 48 (2002). But the recognition of the FBL in the UCP is a significant indication that the international financial community regards the FBL in the same manner as any other negotiable bill of lading that would be issued by a vessel owner or operator.

Achieving that status for the FBL was not born without considerable pain—even within FIATA itself. Professor Ramberg still remembers when, in his capacity as Chairman of the FIATA Combined Transport Committee, he submitted the FBL for acceptance at a FIATA meeting at Geneva in 1971. The opposition from some countries—mainly on the European continent—was fierce, and it went to the point where FIATA's president, Derek Hays of the United Kingdom, threatened to resign unless the FBL was accepted. It may seem strange that there was such an opposition to something that is not only perfectly natural and is accepted today by freight forwarders all over the world, but also a powerful tool for the promotion of freight forwarding services. The problem stemmed from the particular risk distribution in insurance systems. Now that the FBL has become

universally accepted as a carrier bill of lading, the insurance markets have reacted accordingly and have long based their premiums on that legal status.

Because of the dual roles of the forwarder, however, the FBL solution has forced forwarders to increase their awareness of mandatory rules that apply to carriers and that cannot be departed from by private agreement. When a forwarder accepts a carrier's liabilities, it also accepts those mandatory rules. A choice thus has to be made whether each freight forwarder really should join the family of carriers in order to market its services more efficiently, or should remain in the category of agents. The choice has been made simple by the worldwide acceptance of the FBL, and nowadays no one would suggest that the choice was unwise.

It should be noted that freight forwarders, in the absence of applicable mandatory law, still have the option under the FIATA system to denounce their status as carriers, as evidenced by the FIATA FCT and the FIATA FCR.[14] The FCR or Forwarders Certificate of Receipt states only, as appears from its name, that the freight forwarder has taken charge of the goods for carriage but the FCR, in the same manner as the shipper's original FBL, may also be used to estop someone not holding the original FCR from giving the freight forwarder instructions with respect to the goods.

Thus, both parties to the transaction—the shipper or consignor and the freight forwarder—have the option of determining whether the freight forwarder will act as an agent, not as a carrier, by issuing a FIATA FCT; or whether

14. For the convenience of the Court, a specimen copy of the FCR is attached to this brief as Addendum 2.

the forwarder will act as a carrier, not as an agent, by issuing a FIATA FBL. *See* RAMBERG, LAW OF FREIGHT FORWARDING at 48. It bears repeating that the freight forwarder under the FCT does *not* assume a carrier's liability and that consequently it cannot be regarded as a multimodal transport operator or as any carrier at all in its capacity as issuer of an FCT. Nonetheless, the possession of an original FCT is required for the release of the cargo at destination. The FCT also would qualify as a document controlling the disposition as required by the Vienna Convention on the International Sale of Goods art. 58.2.

The FCT plainly is the document a forwarder must use to establish his status as an agent and, thereby, limit his liability to "the careful selection of third parties. . . ." *See* FIATA FCT, DOCUMENTS AND FORMS (FIATA 2001) (Addendum 1 at 11.)

There is nothing inconsistent between the FIATA form FBL on the one side and the non-vessel-operating common carrier's bill of lading, as required by the U.S. Federal Maritime Commission on the other. A FIATA freight forwarder issuing an FBL assumes the same carrier liability as an FMC non-vessel-operating common carrier. *See* 46 U.S.C. app. § 1702(17)(B) (definition of "non-vessel-operating common carrier"). If anything, the FIATA system is clearer because the FIATA freight forwarder who chooses to limit its functions to those of the traditional freight forwarder who assumes no carrier liability, may issue an FCT certifying that he assumes no carrier liability. In the U.S. system, a traditional freight forwarder who does not accept carrier responsibility issues no bill of lading, and is defined by the Shipping Act as an agent of the shipper. *See* 46 U.S.C. app. § 1702(17)(A).

There is no reason in law or comity to give the FIATA form FBL a different and contrary reading to the typical bill of lading forms used by U.S. non-vessel-operating common carriers. The FBL clearly and adequately establishes the freight forwarder as carrier with carrier liability, as the FIATA drafters of the form bill and those freight forwarders and shippers who rely on the form agree.

IV. The FBL Resolves a Freight Forwarder's Liability as Multimodal Transport Operator by adopting the "Network Principle"

The foregoing distinction between the freight forwarder as agent and as carrier is unaffected by the manner of transportation of the goods. Thus, when the transport is performed by a single mode of transport, the only contract is the one issued by the forwarder acting as carrier. When a multimodal transport is contemplated, the forwarder may still act as carrier even though each sub-contract of carriage is performed by a different mode (so-called segmented transport). Different modes of transport call for the application of different rules with respect to the basis of the transport as well as the limitation of liability. If separate contracts are made for each segment from the place of dispatch to the final destination (segmented transport), then different rules apply for each segment depending upon the mode of transport. If, on the other hand, one contract is made for transport engaging at least two different modes of transport, then it is necessary to resolve whether or not the liability of such a carrier (the so-called multimodal transport operator—MTO) should be segmented so that liability would depend upon the segment in which the loss or damage occurred. The contract should be made to reveal whether the MTO's liability is intended to be segmented so as to apply to the segment during which the loss occurred or, alternatively, whether his liability should be the same regardless

of the segment during which the loss occurred (the so-called uniform system). *See* RAMBERG, LAW OF FREIGHT FORWARDING at 18-19; RAMBERG, MULTIMODAL TRANSPORT at 25-26. The FBL resolves that choice by adopting the "network principle," pursuant to which a different liability regime applies by international convention or national law depending on which mode of transportation is being used at the time of the loss.

CONCLUSION

For the foregoing reasons, Professor Ramberg urges this Court to construe the FBL form in this case as that form was intended to be interpreted, *i.e.*, as a contract of carriage between the issuing freight forwarder and the named shipper or consignor, creating between them a carrier-shipper relationship, not an agency relationship.

Respectfully submitted,

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* Counsel gratefully acknowledges the work of Michael W. Lodwick, the principal author of this brief, who died less than a week after finishing a substantially complete draft of this brief.

APPENDIX

Excerpts From Documents And Forms Of The International Federation Of Freight Forwarders Associations

DOCUMENTS AND FORMS
DOCUMENTS ET FORMULAIRES
DOKUMENTE UND FORMULARE



International Federation of Freight Forwarders Associations
Fédération Internationale des Associations de Transitaires et Assimilés
Internationale Föderation der Spediteurorganisationen

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Suppliers or Forwarders Principals

System of National Association

FIATA FCR

No.

Forwarders Certificate of Receipt

ORIGINAL

Form Ref.

Consignee

Marks and numbers	Number and kind of packages	Description of goods	Gross weight	Measurement

specimen

according to the declaration of the consignor

The goods and instructions are accepted and dealt with subject to the General Conditions printed overleaf

We certify having assumed control of the above mentioned consignment in external apparent good order and condition

☐ at the disposal of the consignee

with irrevocable instructions*

☐ to be forwarded to the consignee

Remarks

Instructions as to freight and charges

* Forwarding instructions can only be cancelled or altered if the original Certificate is surrendered to us, and then only provided we are still in a position to comply with such cancellation or alteration.

Instructions authorizing disposal by a third party can only be cancelled or altered if the original Certificate of Receipt is surrendered to us, and then only provided we have not yet received instructions under the original authority.

Place and date of issue

Stamp an signature

FIATA FCR
Forwarders Certificate of Receipt

The Forwarders Certificate of Receipt was introduced by FIATA for the use by international freight forwarders within the organisation of FIATA. The FIATA FCR document enables the freight forwarder to provide the consignor with a special document as an official acknowledgement that he has assumed responsibility of the goods.

The FIATA FCR can be handed over to the consignor immediately after the freight forwarder has received the consignment.

By completing the FIATA FCR the freight forwarder certifies that he is in possession of a specific consignment with irrevocable instructions for despatch to the consignee shown in the document or for keeping it at his disposal. These instructions may only be cancelled if the original FIATA FCR document is handed over to the issuing freight forwarder and only if he is in a position to comply with such cancellation or alteration.

The FIATA FCR will primarily be used when the supplier sells the goods ex works and needs to prove that he has complied with his obligations to the buyer by presenting a FIATA FCR. In the case of a Letter of Credit the seller will under such conditions be able to present a FIATA FCR issued by a forwarder in order to obtain payment of the sales price placed at his disposal by the buyer under the terms of the Letter of Credit. The seller can no longer dispose of goods handed over to the forwarder once the FIATA FCR document has been handed over to the buyer.

The FIATA FCR is not negotiable. As the delivery of the consignment to the consignee does not depend on the handing over of this document, only one original is issued. Should further copies be required, forms specially overprinted with the words "Copy not negotiable" should be used.

When issuing a FIATA FCR, the freight forwarder should ensure that:

1) he has taken over the goods specified therein and that the right of disposal of these goods is vested solely in him;

2) the goods appear to be in apparent good order and condition;

3) the details on the document clearly correspond with the instructions he has received;

4) the conditions of freight documents (B/L etc.) are not contrary to the obligations he has assumed according to the FIATA FCR document.

The FIATA FCR bears the general national freight forwarding conditions of the issuing country on the reverse. The document may only be used by freight forwarders who adhere to these general conditions in their forwarding activities.

It is recommended that the freight forwarder covers his liability by insurance in accordance with the FIATA FCR requirements.

FIATA FCR
Forwarders Certificate of Receipt

Le Forwarders Certificate of Receipt a été introduit par la FIATA pour être utilisé par les transitaires internationaux, organisés dans le cadre de la FIATA. Le FIATA FCR permet au transitaire de remettre à l'expéditeur un document spécial attestant officiellement la prise en charge de la marchandise par ses soins.

Le FIATA FCR peut être remis à l'expéditeur immédiatement après réception de la marchandise par le transitaire.

En établissant un FIATA FCR, le transitaire certifie qu'il est en possession d'un envoi clairement identifié, avec des instructions irrévocables d'expédier les marchandises au destinataire indiqué sur le document, ou de les tenir à sa disposition. Cet ordre ne peut être annulé que si l'original du FIATA FCR est retourné au transitaire qui l'a émis, et uniquement si le transitaire est encore en mesure d'en effectuer l'annulation ou la modification demandée.

Le FIATA FCR sera avant tout utilisé lorsque le fournisseur vend sa marchandise départ usine et a besoin de prouver qu'il a rempli ses obligations envers l'acheteur par la présentation d'un FIATA FCR. Dans le cas d'une lettre de crédit, le vendeur pourra dans ces conditions présenter un FIATA FCR, émis par le transitaire, en vue d'obtenir le paiement du prix de vente tenu à sa disposition par l'acheteur selon les termes de la lettre de crédit. Le vendeur ne peut plus disposer des marchandises remises au transitaire, quand le document FIATA FCR a été remis à l'acheteur.

Le FIATA FCR n'est pas négociable. Etant donné que la délivrance de la marchandise au destinataire ne dépend pas de la remise de ce document, un seul original est établi. Si des copies supplémentaires sont requises, il sera fait usage de formulaires surimprimés à cette fin avec les mots "Copie non négociable".

En émettant le document FIATA FCR, le transitaire doit s'assurer, que:

1) les marchandises dans ce document ont été réceptionnées par lui-même et qu'il est seul en droit de disposer de ces marchandises;

2) les marchandises paraissent être en bon état apparent;

3) les données reprises dans le document correspondent exactement aux instructions reçues;

4) les conditions des documents de transport (B/L, etc.) ne sont pas en contradiction avec les obligations qu'il assume conformément au document FIATA FCR.

Le document FIATA FCR comporte au verso les Conditions Générales du pays de l'organisation membre. Les seules entreprises de transitaires autorisées à émettre ce document sont les entreprises de transitaires qui s'engagent à appliquer ces Conditions Générales dans leurs transactions commerciales.

Il est recommandé que le transitaire couvre sa responsabilité par une assurance conforme aux conditions du FIATA FCR.

Suppliers or Forwarders Principals

Stamp of National Association

FIATA FCT

No.

Forwarders Certificate of Transport

ORIGINAL

Forw. Ref.

Consigned to order of

Notify address

Conveyance — from/via

Destination

Marks and numbers | Number and kind of packages | Description of goods | Gross weight | Measurement

specimen

according to the declaration of the consignor

The goods and instructions are accepted and dealt with subject to the General Conditions printed overleaf.

Acceptance of this document or the invocation of rights arising therefrom acknowledges the validity of the following conditions, regulations and exceptions also of the trading conditions printed overleaf, except where the latter conflict with conditions 1–8 below.

1. The undersigned are authorized to enter into contracts with carriers and others involved in the execution of the transport subject to the latter's usual terms and conditions.
2. The undersigned do not act as Carriers but as Forwarders. In consequence they are only responsible for the careful selection of third parties, instructed by them, subject to the conditions of Clauses 3 hereunder.
3. The undersigned are responsible for delivery of the goods to the holder of this document through the intermediary of a delivery agent of their choice. They are not responsible for acts or omissions of Carriers involved in the execution of the transport or of other third parties. The undersigned Forwarders will, on request, assign their rights and claims against Carriers and other parties.
4. Insurance of the goods will only be effected upon express instructions in writing.
5. Unforeseen and/or unforeseeable circumstances entitle the undersigned to arrange for deviation from the envisaged route and/or method of transport.
6. Unforeseen and/or unforeseeable disbursements and charges are for the account of the goods.

Insurance through the intermediary of the undersigned Forwarders

☐ Not covered

☐ Covered according to the attached Insurance Policy/Certificate

All disputes shall be governed by the law and within the exclusive jurisdiction of the courts at the place of issue.

For delivery of the goods please apply to:

Freight and charges prepaid to:

Charges for account of goods, load or rail load.

We, the Undersigned Forwarders, in accordance with the instructions of our Principals, have taken charge of the abovementioned goods in good external condition as/: .....

for despatch and delivery as stated above or under signed surrender of this document properly endorsed.

In witness thereof the Undersigned Forwarders have signed ..... originals of this FCT document, all of this tenor and date. When one of these has been accomplished, the other(s) will have their validity. .....

Place and date of issue

Stamp and signature

Text authorized by FIATA, COPYRIGHT FIATA / Zurich - Switzerland 5.88

FIATA FCT
Forwarders Certificate of Transport

The Forwarders Certificate of Transport was introduced by FIATA for the use by international freight forwarders within the FIATA Organisations.

By issuing a FIATA FCT document to the consignor, the freight forwarder assumes the obligation to deliver the goods at destination through the medium of an agent appointed by him. The FIATA FCT can be handed over to the consignor immediately after the consignment has been handed over to the freight forwarder for shipment.

By issuing the FIATA FCT the freight forwarder certifies that he has assumed responsibility for dispatch and delivery of specific goods according to instructions he has received from the consignor as indicated in the document.

The freight forwarder is responsible for the delivery of the goods at destination through a delivery agent appointed by him to the holder of the document in accordance with the conditions stipulated on the reverse of the FIATA FCT.

The FIATA FCT has a "block" function. The freight forwarder is only responsible for the forwarding and delivery of the goods. The FIATA FCT, as distinguished from the FBL, is not a document subjecting the freight forwarder to a liability as carrier but his liability is governed by the applicable freight forwarding conditions.

The FIATA FCT will therefore be of importance in all cases where the transport has to be arranged for delivery to the consignee. The seller will be able to obtain payment of the selling price from his bank against the FIATA FCT "cash against Documents"

The FIATA FCT is negotiable when made out "to Order" (see also ICC Doc. 470/251 Art. 24)

The FIATA FCT is negotiable, as the delivery of the consignment may only be effected against presentation of the original document, duly endorsed.

When issuing the FIATA FCT document the freight forwarder should ensure that:

1) he has taken over the goods specified therein and that the right of disposal of these goods vested solely in him;

2) the goods appear to be in apparent good order and condition;

3) the details on the document clearly correspond with the instructions he has received;

4) conditions of freight documents (B/L etc.) are not contrary to the obligations he has assumed according to the FIATA FCT document;

5) responsibility for the insurance of the goods has been agreed;

6) it is clearly specified whether one or more originals have been issued.

It is recommended to dispatch the FIATA FCT documents by registered post only.

The FIATA FCT bears the general national forwarding conditions of the issuing country on the reverse. The document may only be used by freight forwarders who adhere to these general conditions in their forwarding activities.

Greatest possible care must be taken in the preparation of these documents as the particulars contained therein must reflect accurately the full details of the consignment. For the preparation of the document by the issuing freight forwarder, the collection of a fee is therefore justified and advisable.

FBL

NEGOTIABLE FIATA MULTIMODAL TRANSPORT BILL OF LADING
issued subject to UNCTAD/ICC Rules for Multimodal Transport Documents (ICC Publication 481)

Consignee to order of

Notify address

Place of receipt

Ocean vessel | Port of loading

Port of discharge | Place of delivery

Marks and numbers	Number and kind of packages	Description of goods	Gross weight	Measurement

specimen

according to the declaration of the consignor

Declaration of interest of the consignor in timely delivery (Clause 6.2.)

Declared value for ad valorem rate according to the declaration of the consignor (Clauses 7 and 8)

The goods and instructions are accepted and dealt with subject to the Standard Conditions printed overleaf.

Taken in charge in apparent good order and condition, unless otherwise noted herein, at the place of receipt for transport and delivery as mentioned above.

One of these Multimodal Transport Bills of Lading must be surrendered duly endorsed in exchange for the goods. In Witness whereof the original Multimodal Transport Bills of Lading all of this tenor and date have been signed in the number stated below, one of which being accomplished the other(s) to be void.

Freight amount	Freight payable at	Place and date of issue
Cargo insurance through the undersigned ☐ not covered ☐ Covered according to attached Policy	Number of Original FBL's	Stamp and signature
For delivery of goods please apply to:		

BEST AVAILABLE COPY

Text authorized by FIATA Copyright reserved FIATA Zurich Switzerland 6.92

Standard Conditions (1992) governing the FIATA MULTIMODAL TRANSPORT BILL OF LADING

Definitions

Freight Forwarder means the Multimodal Transport Operator who issues this FBL and is named on the face of it and assumes liability for the performance of the multimodal transport contract as a carrier. Also hereinafter means and includes the Shipper, the Consignor, the Consignee, the Holder of this FBL, the Receiver and the Owner of the Goods.

Consignor means the person who concludes the multimodal transport contract with the Freight Forwarder.

Consignee means the person entitled to receive the goods from the Freight Forwarder.

Taken in charge means that the goods have been handed over to and accepted for carriage by the Freight Forwarder at the place of receipt evidenced on this FBL.

Goods means any property including live animals as well as containers, pallets or similar articles of transport or packaging not supplied by the Freight Forwarder, irrespective of whether such property is to be or is carried on or under deck.

1 **Applicability**
Notwithstanding the heading „FIATA Multimodal Transport Bill of Lading (FBL)" these conditions shall also apply if only one mode of transport is used.

2 **Issuance of this FBL**
2.1 By issuance of this FBL the Freight Forwarder
a) undertakes to perform and/or in his own name to procure the performance of the entire transport from the place at which the goods are taken in charge (place of receipt evidenced in this FBL) to the place of delivery designated in this FBL
b) assumes liability as set out in these conditions.
2.2 Subject to the conditions of this FBL the Freight Forwarder shall be responsible for the acts and omissions of his servants or agents acting within the scope of their employment, or any other person of whose services he makes use for the performance of the contract evidenced by this FBL, as if such acts and omissions were his own.

3 **Negotiability and title to the goods**
3.1 This FBL is issued in a negotiable form unless it is marked „non negotiable". It shall constitute title to the goods and the holder by endorsement of this FBL, shall be entitled to receive or to transfer the goods herein mentioned.
3.2 The information in this FBL shall be prima facie evidence of the taking in charge by the Freight Forwarder of the goods as described by such information unless a contrary indication, such as „shipper's weight, load and count", „shipper packed container" or similar expressions, has been made in the printed text or superimposed on this FBL. However proof to the contrary shall not be admissible when a negotiable FBL has been transferred to the consignee for valuable consideration who in good faith has relied upon or set thereon.

4 **Dangerous Goods and Indemnity**
4.1 The Merchant shall comply with rules which are mandatory according to the national law or by reason of International Convention, relating to the carriage of goods of a dangerous nature, and shall in any case inform the Freight Forwarder in writing of the exact nature of the danger before goods of a dangerous nature are taken in charge by the Freight Forwarder and indicate to him, if need be, the precautions to be taken.
4.2 If the Merchant fails to provide such information and the Freight Forwarder is unaware of the dangerous nature of the goods and the necessary precautions to be taken and if, at any time, they are deemed to be a hazard to life or property, they may at any place be unloaded, destroyed or rendered harmless, as circumstances may require, without compensation. The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability or expense arising out of their being taken in charge, or their carriage, or of any measure ordered thereto.
The burden of proving that the Freight Forwarder knew the exact nature of the danger constituted by the carriage of the said goods shall rest on the Merchant.
4.3 If any goods shall become a danger to life or property, they may in like manner be unloaded or landed at any place or destroyed or rendered harmless, if such danger was not caused by the fault and neglect of the Freight Forwarder. He shall have no liability and the Merchant shall indemnify him against all loss, damage, liability and expenses arising therefrom.

5 **Description of Goods and Merchant's Packing and Inspection**
5.1 The Consignor shall be deemed to have guaranteed to the Freight Forwarder the accuracy, at the time the goods were taken in charge by the Freight Forwarder, of all particulars relating to the general nature of the goods, their marks, number, weight, volume and quantity, and, if applicable, to the dangerous character of the goods, as furnished by him or on his behalf for insertion on the FBL.
The Consignor shall indemnify the Freight Forwarder against all loss, damage and expense resulting from any inaccuracy or inadequacy of such particulars.
The Consignor shall remain liable even if the FBL has been transferred by him.
The right of the Freight Forwarder to such an indemnity shall in no way limit his liability under this FBL to any person other than the Consignor.
5.2 The Freight Forwarder shall not be liable for any loss, damage or expense caused by defective or inadequate packing of goods or by inadequate loading or packing within containers or other transport units when such loading or packing has been performed by the Merchant or on his behalf by a person other than the Freight Forwarder or by the defect or unsuitability of the containers or other transport units supplied by the Merchant, or if supplied by the Freight Forwarder if a defect or unsuitability of the container or other transport unit would have been apparent upon reasonable inspection by the Merchant.
The Merchant shall indemnify the Freight Forwarder against all loss, damage, liability and expense so incurred.

6 **Freight Forwarder's Liability**
6.1 The responsibility of the Freight Forwarder for the goods under these conditions covers the period from the time the Freight Forwarder has taken the goods in his charge to the time of their delivery.
6.2 The Freight Forwarder shall be liable for loss of or damage to the goods as well as for delay in delivery if the occurrence which caused the loss, damage or delay in delivery took place while the goods were in his charge as defined in Clause 2.1 a. unless the Freight Forwarder proves that no fault or neglect of his own, his servants or agents or any other person referred to in Clause 2.2 has caused or contributed to such loss, damage or delay. However the Freight Forwarder shall only be liable for loss following from delay in delivery if the Consignor has made a declaration of interest in timely delivery which has been accepted by the Freight Forwarder and stated in the FBL.
6.3 Arrival times are not guaranteed by the Freight Forwarder. However, delay in delivery occurs when the goods have not been delivered within the time expressly agreed upon or, in the absence of such agreement, within the time which would be reasonable to require of a diligent Freight Forwarder, having regard to the circumstances of the case.
6.4 If the goods have not been delivered within ninety consecutive days following such date of delivery as determined in Clause 6.3, the claimant may, in the absence of evidence to the contrary, treat the goods as lost.
6.5 When the Freight Forwarder establishes that, in the circumstances of the case, the loss or damage could be attributed to one or more causes or events specified in a. - e. of the present clause, it shall be presumed that it was so caused, always provided, however, that the claimant shall be entitled to prove that the loss or damage was not, in fact, caused wholly or partly by one or more of such causes or events:
a. an act or omission of the Merchant or person other than the Freight Forwarder acting on behalf of the Merchant or from whom the Freight Forwarder took the goods in charge
b. insufficiency or defective condition of the packaging or marks and/or numbers
c. handling, loading, stowage or unloading of the goods by the Merchant or any person acting on behalf of the Merchant
d. inherent vice of the goods
e. strike, lockout, stoppage or restraint of labour.
6.6 **Defences for carriage by sea or inland waterways**
Notwithstanding Clauses 6.2., 6.3. and 6.4. the Freight Forwarder shall not be liable for loss, damage or delay in delivery with respect to goods carried by sea or inland waterways when such loss, damage or delay during such carriage has been caused by:
a. act, neglect or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship
b. fire, unless caused by the actual fault or privity of the carrier, however, always provided that whenever loss or damage has resulted from unseaworthiness of the ship, the Freight Forwarder can prove that due diligence has been exercised to make the ship seaworthy at the commencement of the voyage.

7 **Paramount Clauses**
7.1 These conditions shall only take effect to the extent that they are not contrary to the mandatory provisions of International Conventions or national law applicable to the contract evidenced by this FBL.
7.2 The Hague Rules contained in the International Convention for the unification of certain rules relating to Bills of Lading, dated Brussels 25th August 1924, or in those countries where they are already in force the Hague Visby Rules contained in the Protocol of Brussels, dated 23rd February 1968, as enacted in the Country of Shipment, shall apply to all carriage of goods by sea and also to the carriage of goods by inland waterways and such provisions shall apply to all goods whether carried on deck or under deck.
7.3 The Carriage of Goods by Sea Act of the United States of America (COGSA) shall apply to the carriage of goods by sea, whether on deck or under deck, if compulsorily applicable to this FBL or would be applicable but for the goods being carried on deck in accordance with a statement on this FBL.

8 **Limitation of Freight Forwarder's Liability**
8.1 Assessment of compensation for loss of or damage to the goods shall be made by reference to the value of such goods at the place and time they are delivered to the consignee or at the place and time when, in accordance with this FBL, they should have been so delivered.
8.2 The value of the goods shall be determined according to the current commodity exchange price or, if there is no such price, according to the current market price or, if there are no such prices, by reference to the normal value of goods of the same name and quality.
8.3 Subject to the provisions of subclauses 8.4. to 8.9. inclusive, the Freight Forwarder shall in no event be or become liable for any loss of or damage to the goods in an amount exceeding the equivalent of 666.67 SDR per package or unit or 2 SDR per kilogramme of gross weight of the goods lost or damaged, whichever is the higher, unless the nature and value of the goods shall have been declared by the Consignor and accepted by the Freight Forwarder before the goods have been taken in his charge, or the ad valorem freight rate paid, and such value is stated in the FBL by him, then such declared value shall be the limit.
8.4 Where a container, pallet or similar article of transport is loaded with more than one package or unit, the packages or other shipping units enumerated in the FBL as packed in such article of transport are deemed packages or shipping units. Except as aforesaid, such article of transport shall be considered the package or unit.
8.5 Notwithstanding the above mentioned provisions, if the multimodal transport does not, according to the contract, include carriage of goods by sea or by inland waterways, the liability of the Freight Forwarder shall be limited to an amount not exceeding 8.33 SDR per kilogramme of gross weight of the goods lost or damaged.
8.6 a. When the loss of or damage to the goods occurred during one particular stage of the multimodal transport, in respect of which an applicable international convention or mandatory national law would have provided another limit of liability if a separate contract of carriage had been made for that particular stage of transport, then the limit of the Freight Forwarder's liability for such loss or damage shall be determined by reference to the provisions of such convention or mandatory national law.
b. Unless the nature and value of the goods shall have been declared by the Merchant and inserted in this FBL, and the ad valorem freight rate paid, the liability of the Freight Forwarder under CO/SSA, where applicable, shall not exceed US$ 500 per package or, in the case of goods not shipped in packages, per customary freight unit.
8.7 If the Freight Forwarder is liable in respect of loss following from delay in delivery, or consequential loss or damage other than loss of or damage to the goods, the liability of the Freight Forwarder shall be limited to an amount not exceeding the equivalent of twice the freight under the multimodal contract for the multimodal transport under this FBL.
8.8 The aggregate liability of Freight Forwarder shall not exceed the limits of liability for total loss of the goods.
8.9 The Freight Forwarder is not entitled to the benefit of the limitation of liability if it is proved that the loss, damage or delay in delivery resulted from a personal act or omission of the Freight Forwarder done with the intent to cause such loss, damage or delay, or recklessly and with knowledge that such loss, damage or delay would probably result.

9 **Applicability to Actions in Tort**
These conditions apply to all claims against the Freight Forwarder relating to the performance of the contract evidenced by this FBL, whether the claim be founded in contract or in tort.

10 **Liability of Servants and other Persons**
10.1 These conditions apply whenever claims relating to the performance of the contract evidenced by this FBL are made against any servant, agent or other person (including any independent contractor) whose services have been used in order to perform the contract, whether such claims are founded in contract or in tort, and the aggregate liability of the Freight Forwarder and of such servants, agents or other persons shall not exceed the limits in clause 8.
10.2 In entering into this contract as evidenced by this FBL, the Freight Forwarder, to the extent of these provisions, does not only act on his own behalf, but also as agent or trustee for such persons, and such persons shall to this extent be or be deemed to be parties to this contract.
10.3 However, if it is proved that the loss of or such loss or damage to the goods resulted from a personal act or omission of such a person referred to in Clause 10.1., done with intent to cause damage, or recklessly and with knowledge that damage would probably result, such person shall not be entitled to benefit of limitation of liability provided for in Clause 8.
10.4 The aggregate of the amounts recoverable from the Freight Forwarder and the persons referred to in Clauses 2.2. and 10.1. shall not exceed the limits provided for in these conditions.

11 **Method and Route of Transportation**
Without notice to the Merchant, the Freight Forwarder has the liberty to carry the goods on or under deck and to choose or substitute the means, route and procedure to be followed in the handling, stowage, storage and transportation of the goods.

12 **Delivery**
12.1 Goods shall be deemed to be delivered when they have been handed over or placed at the disposal of the Consignee or his agent in accordance with this FBL, or when the goods have been handed over to any authority or other party to whom, pursuant to the law or regulation applicable at the place of delivery, the goods must be handed over, or such other place at which the Freight Forwarder is entitled to call upon the Merchant to take delivery.
12.2 The Freight Forwarder shall also be entitled to store the goods at the sole risk of the Merchant, and the Freight Forwarder's liability shall cease, and the cost of such storage shall be paid upon demand, by the Merchant to the Freight Forwarder.
12.3 If at any time the carriage under this FBL is or is likely to be affected by any hindrance or risk of any kind including the condition of the goods) not arising from any fault or neglect of the Freight Forwarder or a person referred to in Clause 2.2 and which cannot be avoided by the exercise of reasonable endeavours the Freight Forwarder may
abandon the carriage of the goods under this FBL and, where reasonably possible, place the goods or any part of them at the Merchant's disposal at any place which the Freight Forwarder may deem safe and convenient, whereupon delivery shall be deemed to have been made and the responsibility of the Freight Forwarder in respect of such goods shall cease.
In any event, the Freight Forwarder shall be entitled to full freight under this FBL and the Merchant shall pay any additional costs resulting from the above mentioned circumstances.

13 **Freight and Charges**
13.1 Freight shall be paid in cash, without any reduction or deferment on account of any claim, counterclaim or set-off, whether prepaid or payable at destination.
Freight shall be considered as earned by the Freight Forwarder at the moment when the goods have been taken in his charge, and not to be returned in any event.
13.2 Freight and all other amounts mentioned in this FBL are to be paid in the currency named in the FBL or at the Freight Forwarder's option, in the currency of the country of dispatch or destination at the highest rate of exchange for bankers sight bills current for prepaid freight on the day of dispatch and for freight payable at destination on the day when the Merchant is notified on arrival of the goods there or on the date of withdrawal of the delivery order, whichever rate is the higher, or at the option of the Freight Forwarder on the date of this FBL.
13.3 All dues, taxes and charges or other expenses in connection with the goods shall be paid by the Merchant.
Where equipment is supplied by the Freight Forwarder, the Merchant shall pay all demurrage and charges which are not due to a fault or neglect of the Freight Forwarder.
13.4 The Merchant shall reimburse the Freight Forwarder in proportion to the amount of freight for any costs for deviation or delay or any other increase of costs of whatever nature caused by war, warlike operations, epidemics, strikes, government directions or force majeure.
13.5 The Merchant warrants the correctness of the declaration of contents, insurance, weight, measurements or value of the goods but the Freight Forwarder has the liberty to have the contents inspected and the weight, measurements or value verified. If on such inspection it is found that the declaration is not correct, it is agreed that a sum equal either to five times the difference between the correct figure and the freight charged, or to double the correct freight less the freight charged, whichever sum is the smaller shall be payable as liquidated damages to the Freight Forwarder for his inspection costs and losses of freight on other goods notwithstanding any other sum having been stated on this FBL as freight payable.
13.6 Despite the acceptance by the Freight Forwarder of instructions to collect freight, charges or other expenses from any other person in respect of the transport under this FBL, the Merchant shall remain responsible for such monies on receipt of evidence of demand and the absence of payment for whatever reason.

14 **Lien**
The Freight Forwarder shall have a lien on the goods and any documents relating thereto for any amount due at any time to the Freight Forwarder from the Merchant including storage fees and the cost of recovering same, and may enforce such lien in any reasonable manner which he may think fit.

15 **General Average**
The Merchant shall indemnify the Freight Forwarder in respect of any claims of a General Average nature which may be made on him and shall provide such security as may be required by the Freight Forwarder in this connection.

16 **Notice**
16.1 Unless notice of loss of or damage to the goods, specifying the general nature of such loss or damage, is given in writing by the consignee to the Freight Forwarder when the goods are delivered to the consignee in accordance with clause 12, such handing over is prima facie evidence of the delivery by the Freight Forwarder of the goods as described in this FBL.
16.2 Where the loss or damage is not apparent, the same prima facie effect shall apply if notice in writing is not given within 6 consecutive days after the day when the goods were delivered to the consignee in accordance with clause 12.

17 **Time bar**
The Freight Forwarder shall, unless otherwise expressly agreed, be discharged of all liability under these conditions unless suit is brought within 9 months after the delivery of the goods, or the date when the goods should have been delivered, or the date when in accordance with clause 8.4. failure to deliver the goods would give the consignee the right to treat the goods as lost.

18 **Partial invalidity**
If any clause or a part thereof is held to be invalid, the validity of this FBL and the remaining clauses or a part thereof shall not be affected.

19 **Jurisdiction and applicable law**
Actions against the Freight Forwarder may be instituted only in the place where the Freight Forwarder has his place of business as stated on the reverse of this FBL and shall be decided according to the law of the country in which that place of business is situated.

The ICC logo denotes that this document has been deemed by the ICC to be in conformity with the UNCTAD/ICC Rules for Multimodal Transport Documents. The ICC logo does not imply ICC endorsement of the document nor does it in any way make the ICC party to any possible legal action resulting from the use of this document.

FBL
Negotiable FIATA Multimodal Transport Bill of Lading

The FIATA Multimodal Transport Bill of Lading (FBL) is a carrier-type transport document set up by FIATA for the use by freight forwarders acting as multimodal transport operators (MTO).

The FBL can also be issued as a marine bill of lading.

The document is negotiable unless marked "non-negotiable". It has been deemed by the International Chamber of Commerce (ICC) to be in conformity with the UNCTAD/ICC Rules for Multimodal Transport Documents published by ICC in its brochure No. 481. Therefore, the FBL bears the ICC logo alongside the symbol of the national freight forwarders association.

Furthermore, the Negotiable FIATA Multimodal Transport Bill of Lading is referred to in the "Guide for Documentary Credit Operations for the Uniform Customs and Practice for Documentary Credits (UCP 500)" of ICC (ICC publication No.515) as an acceptable freight forwarders transport document.

A freight forwarder acting as Multimodal Transport Operator (MTO) or marine carrier issuing a FBL is responsible for the performance of transport. The freight forwarder does not only assume responsibility for delivery of the goods at destination, but also for all carriers and third parties engaged by him for the performance of the whole transport.

By issuing a FBL the freight forwarder accepts a basic liability limit of 666.67 SDR per package or unit, or 2 SDR per kilogram of gross weight of the goods lost or damaged, whichever is the higher (Art. 8.3 of the FBL conditions), or, if a multimodal transport does not include carriage of goods by sea or inland waterways, a basic liability limit of 8.33 SDR per gross weight (Art. 8.5 of the FBL conditions). When loss of or damage to the goods can be attributed to a particular stage of transport in a multimodal transport operation, the freight forwarder's liability is limited according to mandatory national or international law applicable to this stage of transport (Art. 8.6 a of the FBL conditions).

When issuing a FBL, the freight forwarder should ensure

1) that he has taken over the goods specified therein and that the right of disposal of these goods is solely vested in him;

2) that the goods appear to be in apparent good order and condition;

3) that details on the document correspond with the instructions he has received;

4) that responsibility for cargo insurance cover has been agreed upon with the consignor;

5) that it is clearly specified how many original FBLs are issued.

Freight Forwarders issuing FBLs have to insure their liability in accordance with the FBL conditions.